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(1)

Supreme Court, U.S.
FILED

10-751

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No. 10-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2010

OMAR KHADR, ET AL.
(AND CONSOLIDATED CASES),

Petitioners,

v.

BARACK OBAMA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Shayana D. Kadidal
J. Wells Dixon
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
skadidal@ccrjustice.org
wdixon@ccrjustice.org

David H. Remes
Counsel of Record
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508
remesdh@gmail.com

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether, in a habeas corpus action brought by an individual held in United States territory, including Guantánamo,

(a) *Munaf v. Geren*, 553 U.S. 674 (2008), requires, and

(b) *Boumediene v. Bush*, 553 U.S. 723 (2008), the Suspension Clause, and the Due Process Clause permit,

the district court to give conclusive effect to the government's assertion that the individual is unlikely to be tortured if transferred to a particular country, disabling the individual from challenging his transfer on the ground that he will likely be tortured there, and the court from fashioning an equitable remedy.[1]

2. Whether, in a habeas corpus action brought by an individual held in Guantánamo:

(a) Section 242(a)(4) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(a)(4), bars "judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment," except in appeals from final orders of deportation.

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[1] This question is also presented in *Mohammed v. Obama*, No. 10- (filed Nov. 5, 2010) (motion for leave to file under seal pending). The Government has made available a public version of the *Mohammed* petition. *See* Lyle Denniston, "*Munaf* test now in open," SCOTUSblog, http://www.scotusblog.Com/2010/11/munaf-test-now-in-open/ (Nov. 23, 2010).

(b) If so construed, Section 242(a)(4) violates the Equal Protection Clause and the Suspension Clause.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth after the signature page.

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Abdah v. Obama, D.D.C. No. 04-1254 (HHK) (Mar. 31, 2005) (Docs. 146 & 147) (orders in other habeas cases requiring Government to give counsel 30 days' advance notice of any intended transfer of detainees from Guantánamo) ("2005 notice orders").

Abdah v. Obama, D.C. Cir. No. 05-5224 (Government's pending appeal from 2005 notice orders), petition by petitioners for initial en banc hearing pending.

In Re: Guantánamo Bay Detainee Litigation, D.D.C. Misc. No. 08-442-TFH (July 11, 2008) (Doc. 52) (order requiring Government to give counsel 30 days' advance notice of any intended transfer of detainees from Guantánamo) ("2008 notice orders"), appearing in *Khadr v. Obama*, D.D.C. No. 04-1136 (July 11, 2008) (Doc. 187).

Khadr v. Obama, No. 08-5233 and consolidated cases (Sept. 3, 2010) (vacating 2008 notice orders, based on *Kiyemba II*).

Mohammed v. Obama, D.C. Cir. No. 10-5218 (July 8, 2010) (summarily reversing preliminary injunction enjoining Government from repatriating Algerian detainee to Algeria, based on *Kiyemba II*).

Mohammed v. Obama, No. 10A52 (July 16, 2010) (denying application to stay mandate for summary reversal order pending filing of petition for certiorari).

Mohammed v. Obama, No. 10-__ (filed Nov. 5, 2010) (petition for certiorari to review D.C. Circuit's summary reversal order).

DECISIONS BELOW

The court of appeals' decision (Pet. 24a), issued on September 3, 2010, is unreported. The district court's order of July 11, 2008 (Pet. 31a) is unreported.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The jurisdiction of the district court rested on 28 U.S.C. § 2241(c)(1), (3), the Suspension Clause, and the Fifth Amendment.

RELEVANT PROVISIONS OF LAW

Suspension Clause, U.S. Const., Art. I, § 9, cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Due Process Clause, U.S. Const., Amdt. V:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

[No person shall be denied the equal protection of the laws.]

Immigration and Naturalization Act, Section 242(a)(4) (8 U.S.C. § 1252(a)(4)):

Claims under the United Nations Convention

Notwithstanding any other provision of law * * * a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment * * *.

STATEMENT OF THE CASE

1. Petitioners are individuals held at the Guantánamo Bay detention facility who have pending petitions for writs of habeas corpus. This case arises out of an order of the United States District Court for the District of Columbia on July 11, 2008 (Pet. 31a) requiring the Government to give counsel for Petitioners 30 days' notice of any intended transfer of a detainee from Guantánamo, to give counsel a chance to object if, for example, counsel fears that the detainee will be tortured in the receiving country ("2008 notice orders"). In a per curiam order dated September 3, 2010, the United States Court of Appeals for the District of Columbia Circuit vacated the 2008 notice orders. (Pet. 24a). In pertinent part, the order reads as follows:

> * * * ORDERED that the district court's order requiring advance notice of transfer, entered in Misc. No. 08-442, *In Re: Guantánamo Bay Detainee Litigation* (D.D.C. July 10), and in the civil actions named therein, be vacated. *See Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

(Pet. 3a.) The cited decision is *Kiyemba II*.[2] Because the D.C. Circuit relied entirely on *Kiyemba II* in

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[2] "*Kiyemba II*" refers to the second in a trio of appeals taken by the Government in Uighur cases. In *Kiyemba I* and *III*, the D.C. Circuit held that the district court has no power to order the transfer of Guantánamo detainees. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*"), and *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) ("*Kiyemba III*"). The petitioners in *Kiyemba I* and *III* expect to file a petition for certiorari seeking review of the decisions.

vacating the 2008 notice orders, Petitioners, effectively, present that decision to this Court for review.[3]

2. The first detainees arrived at Guantánamo in January 2002, and the first habeas petitions by detainees were filed soon thereafter. After this Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that 28 U.S.C. § 2241 confers jurisdiction on the district court to hear the detainees' challenges to the legality of their detention, many other detainees filed habeas petitions. This Court summarized what followed:

> After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment.

Boumediene v. Bush, 553 U.S. 723, 734-35 (2008). The parties cross-appealed. Judge Green certified

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[3] An appeal by the Government from notice orders issued in 2005 ("2005 notice orders") is pending in the D.C. Circuit. The petitioners in that case have filed a petition for initial hearing en banc to overrule *Kiyemba II*. *Abdah v. Obama*, D.C. Cir. No. 05-5224. Because the D.C. Circuit's disposition of that motion could materially affect this petition, the Court should consider holding this petition pending the D.C. Circuit's disposition of the *Abdah* appeal.

her decision for interlocutory appeal and stayed her cases pending appeal.

3. In March 2005, the various district court judges handling Guantánamo habeas cases began issuing orders requiring the Government to provide counsel with 30 days' notice of any intended transfer of a detainee petitioner from Guantánamo. *See, e.g.*, *Abdah v. Obama*, D.D.C. No. 04-1254 (Mar. 29, 2005). The Government appealed the 2005 notice orders.

On July 11, 2008, after *Boumediene* came down, Judge Thomas F. Hogan, the coordinating judge, issued the 2008 notice orders. (Pet. 31a.) The Government appealed the 2008 notice orders, just as it had appealed the 2005 notice orders. The D.C. Circuit held both sets of appeals in abeyance pending its decision in *Kiyemba II*. That case was to be the first in which the D.C. Circuit would decide the validity of notice orders.

On April 7, 2009, the D.C. Circuit issued its decision in *Kiyemba II*, 561 F.3d 509, a Uighur case. In its decision, the court invalidated 2005 notice orders on the ground that the district court had no power to enjoin transfers – including for fear of torture in the receiving country – and therefore the notice orders were superfluous. Specifically, the court held that, because the Government's *policy* is not to transfer Guantánamo detainees to countries where they are more likely than not to be tortured, a court may not consider evidence that a particular detainee, if transferred to a *particular* country, in fact is likely to be tortured. 561 F.3d at 514-15. The D.C. Circuit rested its holding on *Munaf v. Geren*, 553 U.S. 674 (2008), which the appeals court read to preclude a court "from second-guessing the Executive's assess-

ment of the likelihood a detainee will be tortured by a foreign sovereign." *Id.* at 515. The court stated:

> The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured * * * in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood.

Id. at 516.

The D.C. Circuit rejected the petitioners' effort "to distinguish *Munaf* on the ground that the habeas petitioners in that case did not raise a claim under the Convention Against Torture, as implemented by the Foreign Affairs Reform and Restructuring (FARR) Act, 8 U.S.C. § 1231 note. *See Munaf*, 128 S. Ct. at 2226 n.6." (This Court in *Munaf* declined to reach the § 242(a)(4) issue.) The D.C. Circuit stated:

> That distinction is of no help to them, however, because the Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal. 8 U.S.C. § 1252(a)(4) ("Notwithstanding any other provision of law * * * including section 2241 of Title 28, or any other habeas corpus provision, * * * a petition for review [of an order of removal] shall be the sole and exclusive means for judicial review of any cause or claim" arising under the Convention). Here the detainees are not challenging a final order of removal. As a consequence, they

> cannot succeed on their claims under the FARR Act, and *Munaf* controls.

561 F.3d at 515.

4. After the D.C. Circuit denied rehearing and rehearing en banc in *Kiyemba II*, the D.C. Circuit vacated the 2005 notice orders in this case. (Pet. 24a.)

REASONS FOR GRANTING THE WRIT

1. The petition in *Mohammed v. Obama*, No. 10-___ (filed Nov. 5, 2010), addresses the first question presented. Petitioners incorporate and will not repeat the arguments in the *Mohammed* petition.

2. Review is also warranted because, in *Kiyemba II*, the D.C. Circuit decided an important issue of federal law that has not been, but should be, settled by this Court (Rule 10(c)), specifically, whether Section 242(a)(4) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(4)(a), bars Guantánamo detainees from raising claims under the United Nations Convention Against Torture and Other Forms of Cruel, Inhumane, or Degrading Treatment or Punishment ("CAT").

Section 242(a)(4) provides:

> Claims under the United Nations Convention
>
> Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive

> means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment * * *.

In *Kiyemba II*, the D.C. Circuit held that § 242(a) limits judicial consideration of CAT claims. 561 F.3d at 514-15. Under the court's reading of § 242(a), only individuals appealing such orders may raise CAT claims.[4]

The D.C. Circuit was mistaken. As an initial matter, the court simply assumed that § 242(a)(4) applies extraterritorially to Guantánamo. That assumption is at least questionable.[5] Moreover, even assuming that § 242(a)(4) applies, the provision governs judicial review of immigration "removal orders," as the title of § 242, "Judicial Review of Orders of Removal," makes clear. Congress simply sought to channel review of removal orders to the courts of appeals by petition for review, and to eliminate habeas review in those situations where such review is available.

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[4] Claims for CAT violations are asserted under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), 8 U.S.C. § 1231 note, which implements CAT. *Munaf* and *Kiyemba II* referred to the petitioners' CAT claims as "FARR Act" claims. For present purposes, we refer to them simply as "CAT claims."

[5] *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (holding that a provision of INA had no extraterritorial application, reaffirming "the presumption that Acts of Congress do not ordinarily apply outside our borders"); *see* also 8 U.S.C. § 101(a)(38) (defining the term "United States" in the INA as limited to certain areas, not including Guantánamo).

Congress added § 242 to the INA in the REAL ID Act of 2005. Pub. L. 109-13, 119 Stat. 302, 310. The legislative history shows that Congress did not intend to eliminate habeas review in cases where petition-for-review jurisdiction is unavailable and habeas review the only review mechanism.[6]

Indeed, the Conference Report states that Congress was concerned, after *INS v. St. Cyr*, 533 U.S. 289 (2001), about creating Suspension Clause problems, and did not intend therefore to eliminate habeas review over challenges that were independent of removal orders and could not be challenged in a petition for review.[7]

Construed to limit judicial review of CAT claims to review of removal orders, § 242(a)(4) violates the Suspension Clause and the Equal Protection Clause. Like the statutes at issue in *Boumediene* (the Detainee Treatment Act of 2005 and Military Commissions Act of 2006), § 242(a)(4), so construed, bars

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[6] As the Conference Report stated, the REAL ID Act "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders." H.R. Rep. No. 109-72, at 175 (2005); *id.* ("the bill would eliminate habeas review only over challenges to removal orders"); *see also Lindaastuty v. Attorney General*, 186 Fed. Appx. 294, 298, 2006 WL 1759556 *3 (3d Cir. 2006) ("The Report specifically states that [the REAL ID Act] would not preclude habeas review over challenges to detention that are independent of challenges to removal orders." (internal quotation marks omitted)).

[7] *See* 151 Cong. Rec. H 2813, H 2873 (2005) (citing *St. Cyr* and emphasizing the "constitutional concerns" with denying review in any forum, including habeas); *id.* (noting *St. Cyr*'s admonition that Congress may only eliminate habeas corpus if it provides an "adequate and effective" alternative).

habeas review, not absolutely, to be sure, but as to particular claims. However, unlike the statutes at issue in *Swain v. Pressley*, 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952), § 242(a)(4) does not provide "habeas-like substitutes" for review of such claims, *see Boumediene*, 128 S. Ct. at 2265, and therefore violates the Suspension Clause. Moreover, as construed, § 242(a)(4) violates equal protection by allowing only individuals petitioning for judicial review of removal orders to assert CAT claims, and precluding other individuals, who may also be facing transfers to likely torture, from asserting such claims.

CONCLUSION

The Court should grant the petition. Alternatively, the Court should hold the petition pending the D.C. Circuit's disposition of the petition for initial en banc hearing in *Abdah*.

Respectfully submitted,

Shayana D. Kadidal
J. Wells Dixon
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
skadidal@ccrjustice.org
wdixon@ccrjustice.org

David H. Remes
Counsel of Record
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508
remesdh@gmail.com

APPENDIX A

PARTIES TO THE PROCEEDING

Respondents in this Court and the court below[8]:

Barack Obama, President of the United States; Robert M. Gates, Secretary of Defense; Thomas Copeman, Jeffrey Harbeson, Army Brigadier General, Commander, Joint Task Force-GTMO; Ray Mabus, Secretary of the Navy; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Donnie Thomas, Commander, Joint Detention Operations Group.

Petitioners in this Court and in the court below[9]:

08-5233

Omar Khadr

08-5234

Falen Gherebi

08-5235

Suhail Abdu Anam

Mohamed Abdu Anam, as Next Friend of Suhail Abdu Anam

Fahmi Abdullah Ubad Al-Tawlaqi

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[8] The respondents are successors to the individuals named in prior filings. Each individual is a respondent in one or more of the consolidated cases.

[9] The D.C. Circuit dismissed some cases as moot or as moot with respect to particular petitioners. (*See* Pet. 27a.) Those cases and individuals are set forth at the end of this list.

Abdullah Admed Ubad Al-Tawlaqi, as Next Friend of Fahmi Abdullah Ubad Al-Tawlaqi

Bashir Naser Ali Almarwalh

Huissen Naser Ali Almarwalh, as Next Friend of Bisher Naser Ali Almarwalh

Masaab Omar Al-Madhwani

Ali Omar Madhwani, as Next Friend of Mussab Omar Al-Madhwani

Abdulkhaliq Al-Baidhani

Khalid Al-Baidhani, as Next Friend of Abdulkhaliq Al-Baidhani

Ali Ahmed Mohammed Al Razehi

Abdullah Ahmed Mohammed Al Razehi, as Next Friend of Ali Ahmed Mohammed Al Razehi

Saeed Ahmed Al-Sarim

Samir Ahmed Al-Sarim, as Next Friend of Saeed Ahmed Al-Sarim

Imad Abdullah Hassan

Amro Abdullah Hassan, as Next Friend of Imad Abdullah Hassan

Jalal Salim Bin Amer

Faez Bin Amer, as Next Friend of Jalal Salim Bin Amer

Ali Yahya Mahdi

Mohamed Yahya Mahdi, as Next Friend of Ali Yahya Mahdi

Khalid Ahmed Kassim

Fadhle Ahmed Kassim, as Next Friend of Khalid Ahmed Kassim

Fahmi Abdullah Ahmed

Kmal Abdullah Ahmed, as Next Friend of Fahmi Abdullah Ahmed

Abdualaziz Abdoh Al Swidi, also known as Abdualaziz Abdoh Alsswidi

Adnan Abdoh Alswidi, as Next Friend of Abdualaziz Abdoh Al Swidi

08-5236

Mahmoad Abdah

Mahmoad Abdah Ahmed, as next friend of Mahmoad Abdah, also known as Mahmood Abdo Ahmed Bin Ahmed

Majid Mahmoud Ahmed, also known as Majed Mohmood, also known as Majid M. Abdu Ahmed

Mahmoud Ahmed, as next friend of Majid Abdah Ahmed

Abdulmalik Abdulwahhab Al-Rahabi

Ahmed Abdulwahhab, as next friend of Abdulmalik Abdulwahhab Al-Rahabi

Mahktar Yahia Naji Al-Wrafie

Foade Yahia Naji Al-Wrafie, as next friend of Makhtar Yahia Naji Al-Wrafie

Aref Abd Il Rheem

Aref Abd Al Rahim, as next friend of Aref Abd Il Rheem

Yasein Khasem Mohammad Esmail

Jamel Khasem Mohammad, as next friend of Yasein Khasem Mohammad Esmail

Adnan Farhan Abdul Latif

Mohamed Farhan Abdul Latif, as next friend of Adnan Farhan Abdul Latif

Othman Abdulraheem Mohammad

Araf Abdulraheem Mohammad, as next friend Othman Abdulraheem Mohammad

Adil El Haj Obaid

Nazem Saeed El Haj Obaid, as next friend of Adil Saeed El Haj Obaid

Mohamed Mohamed Hassan Odaini

Bashir Mohamed Hassan Odaini, as next friend of Mohamed Mohamed Hassan Odaini

Bashir Mohamed Hassan Odaini, as next friend of Mohamed Mohamed Hassan Odaini

Sadeq Mohammed Said

Abd Alsalam Mohammed Saeed

Sheab Al Mohamedi

Salman Yahaldi Hsan Mohammed Saud

Yahiva Hsane Mohammed Saud Al-Rbuaye

08-5237

Ibrahim Ahmed Mahmoud Al Qosi

08-5238

Saifullah Paracha

Farhat Paracha, Next Friend

08-5239

Jarallah Al-Marri

Ali Salah Kahlah Al-Marri

08-5240

Ahcene Zemiri

Karina Dereshteanu, as next friend of Ahcene Zemiri

08-5241

Omar Deghayes

Taher Desghayes, Next friend of Omar Deghayes

James Abdullah Kiyemba

Theresa Namuddu, Next friend of Jamel Kiyemba

Shaker Abdurraheem Aamer

Saeed Ahmed Siddique, Next friend of Shaker Abdurraheem Aamer

08-5242

Hani Saleh Rashid Abdullah

Yosra Saleh Rashid Abdullah, Next friend of Hani Saleh Rashid Abdullah

Rami Bin Saad Al-Oteibi

08-5243

Mahmood Salim Al Mohammed

Abdulla Salim Al-Mohammed, Brother and Next Friend of Mahmood Salim Mohammed

08-5244

Omar Deghayes, as next friend of Alladeen

08-5245

Muhammad Al-Adahi

Miriam Ali Abdullah Al-Haj, as next friend of Muhammad Al-Adahi

Muhammad Ali Abdullah Bawazir

Salih Ali Abdullah Bawazir, as next friend of Muhammad Ali Abdullah Bawazir

Fahmi Salem Al-Assani

Salem Said Al-Assani, as next friend of Fahmi Salem Al-Assani

Suleiman Awadh Bin Aqil Al-Nahdi

Ghazi Awadh Bin Aqil Al-Nahdi, as next friend of Suleiman Awadh bin Aqil Al-Nahdi

Zahir Omar Khamis B Hamdoon

Muhammad Omar Khamis B Hamdoon, as next friend of Zahir Omar Khamis Bin Hamdoon

08-5246

Ahmed Abdullah Al-Wazan

08-5247

Mohammed Abdul Rahman

08-5248

Djamel Ameziane

08-5249

Ahamed Abdul Aziz

Sabiha Awad Hadrami, As next friend of Ahamed Abdul Aziz

08-5250

Saleh Abdulla Al-Oshan

Mohammed Saad Mohammed Al-Oshan, as next friend of Saleh Abdulla Al-Oshan

Zaben Dhaher Al Shammari

Nasser Daher Al Shammari, as next friend of Zaben Dhaher Al Shammari

Abdul Rahman Shalby

Shaker Aamer, As next friend of Abdul Rahman Shalby, Abdullah Aali Al Otiabi, Muhammed Fahad Al Qahtany and Musa Al Madany

Adbullah Aali Al Otiabi

Muhammed Fahad Al Qahtany

Musa Al Madany

08-5251

Muhammed Khan Tumani

Abd Al Nisr Khan Tumani

08-5252

Mohammedou Ould Salahi

Yahdih Ould Salahi, as next friend of Mohammedou Ould Salahi

08-5253

Omer Saeed Salem Al Daini, also known as Amer Said Salim Al Daini

Mohammed Saeed Salem Al Daini, as next friend of Omer Saeed Salem Al Daini,

08-5254

Mohsen Abdrub Aboassy

Mohammed Saeed Bin Salman

Sameer Najy Hasan Mukbel

Abdulla Ahdrub Aboassy, as Next Friend of Mohsen Abdrub Aboassy

Saeed Salim Bisalman, as Next Friend of Mohammed Saeed Bin Salman

Najy Hasan Mukbel, as Next Friend of Sameer Najy Hasan Mukbel

08-5255

Adel Ben Hamlily

08-5256

Ahmed Abu Imran

Najeeb Al Husseini

Mohammed Al Nadour

Mohammed Fahreo

Lahcen Ikasrien

Mohammed Mazoz

Moussa

Abdul Latif Mohammed Nasser

Said

Younis Shakur

Ridouane Shakur

Tareq

Omar Deghayes, as next friend of the above 12 persons

08-5257

Alladeen

Ismail Al-Mashad

08-5258

Khiali-Gul

08-5259

Mohamedou Ould Slahi

08-5260

Karin Bostan

08-5261

Yasin Muhammed Basardh

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Ali Hussian Mohammad Muety Shaaban

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Kasimbekov Komoliddin Tohirjanovich

08-5265

Mohamedou Ould Slahi

08-5266

Arkan Mohammad Ghafil Al Karim

08-5267

Asim Ben Thabit Al-Khalaqi

08-5268

Abdulsalam Ali Abdulrahman Al-Hela, also known as Abd Al-Salam Ali Al-Hila

Abdulwahab Ali Abdulrahman Al-Hela, As Next Friend of Abdulsalam Ali Abdulrahman Al-Hela

08-5269

Mohammad Sayyed Shah, as next friend of Ali Shah Mousovi

Izaatullah Nusrat

Abdul Wahid, as next friend of Izaatullah Nusrat and Haji Nusrat

Haji Rohullah Wakil

Mohammad Wakil, as next friend of Haji Rohullah Wakil

Sabar Lal

Mohammed Hassan, as next friend of Sabar Lal

Wali Mohammed Morafa

Hadaya Morafa, as next friend of Wali Mohammed Morafa

Abdul Razak Iktiar Mohammed

Chaman Gul Khialigol

Honorgol Khialigol, as Next Friend of Chaman Gul Khialigol

08-5270

Omar Mohammed Khalifh

Omar Deghayes, as next friend of Omar Mohammed Khalifh

08-5272

Abdulzaher

08-5273

Tariq Mahmoud Alsawam

08-5274

Farhi Saeed Bin Mohammed

Moazzam Begg, as next friend of Farhi Saeed bin Mohammed

08-5275

Motai Saib

Bisher Al-Rawi, As Next Friend of Motai Saib

08-5276

Saeed Mohammed Saleh Hatim

Ali Mohammed Saleh Al-Salahi, as next friend of Saeed Mohammed Saleh Hatim

Mohammed Nasser Yahia Abdullah Khussrof

Fatima Nasser Yahia Abdullah Khussrof, as next friend of Mohammed Nassert Yahia Abdullah Khussrof

08-5277

Jihad Dhiab

Shaker Aamer, as Next Friend of Jihad Dhaib

08-5278

Ahmed Doe, Last Name Being Unknown

Omar Deghayes, As Next Friend of Ahmed "Doe"

08-5280

Abdl Hadi Omar Mahmoud Faraj

08-5281

Adil Bin Muhammad Al Wirghi

Tawiss Bint Hasan Al Wirghi, as next friend of Adil bin Muhammad al Wirghi

08-5282

Nabil, (Last Name Unknown)

Jamaal Kiyemba, As next friend of Nabil (Last Name Unknown)

08-5283

Abbar Sufian Al Hawary

08-5284

Sufyian Barhoumi

Jamaal Kiyemba, As next friend of Shafiiq (Last Name Unknown)

08-5285

Jamal Kiyemba, Next Friend

Abdusabur Doe

Hammad Doe

Khalid Doe

Saabir Doe

08-5286

Ibrahim Osman Ibrahim Idris, also known as Abraham Othman Abrahim Edries

08-5288

Hassan Bin Attash

Benyamin Mohammed Al Habashi, as Next Friend of Hassan Bin Attash

A'Amer Shaker, As Next Friend of Hassan Bin Attash

08-5289

Hamid Al Razak

Bisher Al-Rawi, As next friend of Hamid Al Razak

08-5291

Abdul Raheem Ghulam Rabbani

Malika, as Next Friend of Abdul Raheem Ghulam Rabbani

Ahmmed Ghulam Rabbani

Fouzia Ahmmed, as Next Friend of Ahmmed Ghulam Rabbani

08-5292

Abdul Zahir

08-5293

Mohammed Rajeb Abu Ghanem

Himiger Sader Abu Ghanem, Next Friend of Mohammed Rajeb Abu Ghanem

08-5294

Ameen Mohammad Albkri

Ali Saleh Albkri, Next Friend of Ameen Mohammad Albkri

08-5295

Hussain Salem Mohammed Almerfedi

Salem Mohammed Salem Abdulla Almerfedi, as next friend of Hussain Salem Mohammed Almerfedi

08-5296

Waleed Saeed BN Saeed Zaid

Mohammed Saeed Bn Saeed Zaid, as next friend of Waleed Saeed Bn Saeed Zaid

08-5297

Hussein Salem Mohammad A. El-Marqodi

08-5299

Usama Hasan Abu Kabir, as Next Friend of Sadar Doe and Arkeen Doe

Sadar Doe, also known as Saddiq Doe

Arkeen Doe

08-5300

Abraham Othman Abrahim Edries

Bisher Al-Rawi, As Next Friend of Abrahim Othman Abrahim Edries

08-5301

Mohammed Al Qahtani

Manea Ahmed Al Qahtani, as next friend of Mohammed Al-Qahtani

08-5302

Ismail Alkhemisi

Hasan Balgaid

Omar Deghayes, As next freind of Ismail Alkhemisi and Hasan Balgaid

08-5303

Ravil Mingaza Gamil

Diliara Mingazova, as wife of Ravil Mingaza Gamil

08-5304

Abdulkadr Abdulkhalik Dad

08-5305

Khaled Abd Elgabar Mohamme Othman

Abd Al Malik Abd Al Wahab, As next friend of Khaled Abd Elgabar Mohammed Othman

08-5306

Issam Hamid Ali Bin Ali Al Jayfi

Hamid Ali Al Jayfi, as next friend of Issam Hamid Ali Bin Ali Al Jayfi

Othman Ali Mohammed Al Shamrany

Ali Mohamed Omar Al Shomrany, as next friend of Othman Ali Mohammed Al Shamrany

Khalid Mohammed Al Thabbi

Muhammed Ahmed Muhammed Alghurbany, as next friend of Khalid Mohammed Al Thabbi

Ali Hamza Ahmed Suliman Bahlool

Abdoul Mohammed Ahmed Bahlool, as next friend of Ali Hamaza Ahmed Suliman Bahlool

Saleh Mohammed Seleh Al Thabbii, also known as Saleh Mohammed Al Dhabi

Fatmah Qhasim Al Ahmadi, as next friend of Saleh Mohammed Seleh Al Thabbii

Adbul Al Qader Ahmed Hussain

Abdulgader Ahmed Hasin Abobaker, as next friend of Abdul Al Qader Ahmed Hussain

08-5308

Abdu Al Qader Hussain Al-Mudafari

Salieh Hussain Ali Al-Mudafari, as Next Friend of Abdu al-Qader Hussain Al-Mudafari

08-5309

Hayal Aziz Ahmed Al-Mithali

Ali Aziz Ahmed Al-Mithali, as next friend of Hayal Aziz Ahmed Al-Mithali

08-5310

Abd Al Hakim Ghalib Ahmad Alhag

Saeed Ghalib Ahmad Alhag, as Next Friend of Abd Al Hakim Ghalid Ahmad Alhag

08-5311

Abdualqader Hossin Ali Al-Mothafri

Saleh Hossin Ali Al-Mothafri, as Next Friend of Abdualqader Hossin Ali Al-Mothafri

08-5312

Mohammed Abdul Rahman Al-Shimrani

Ali Abdul Rahman Al-Shimrani, As Next Friend of Mr. Mohammed aBdul Rahman Al-Shimrani

08-5313

Ahmed Ben Bacha

Salah Belbacha, as next friend of Ahmed Ben Bacha

08-5314

Abdullah Wazir Zadran

Zahir Shah, as Next Friend of Abdullah Wazir Zadran

Abdul Haq

Abdul Barri, as Next Friend of Abdul Haq

Mirra Jaan, as Next Friend of Tooran Mohammad Amannullah

Mohammad Wabi Umari

Gul Hyat Khan, as Next Friend of Mohammad Wabi Umari

Abdullah Mujahid Haq

Farid Ahmed, as Next Friend of Abdullah Mujahid Haq

Mohammad Zahir

Abdul Wahab, as Next Friend of Mohammad Zahir

Ghulam Roohani

Ghulam Jeelani, as Next Friend of Ghulam Roohani

Dr. Hiyatullah

Abdul Zahir, DR., as Next Friend of Dr. Hiyatulla

Honorgol Khialigol, as Next Friend of Chaman Gul Khialigol

Chaman Gul Khialigol

08-5315

Ahmad Mohammad Al Darbi

Ali Mohammad Al Darbi

08-5317

Adham Mohammed Ali Awad

08-5318

Zakaria Al-Baidany

Ahmed Mohammed Hassi Al Rammah, as Next Friend of Zakaria Al-Baidan

08-5319

Ismail Ali Al Rammi

Soaid Salh Ahmad Al Rammi, as Wife and Next Friend of Ismail Ali Al Rammi

Adel Ali Ahmad Al Rammi, as Wife and Next Friend of Ismail Ali Al Rammi

08-5320

Salim Said

Anwar Handan Al Shimmiri

Suliman Honaheem Alowaidah, As the next friend of Anwar Handan Al Shimmiri

Saad Al Qahtaani

Sami Muhyideen, As the next friend of Saad Al Qahtaani

Bandar Al Jaabir

Jamal Kiyemba, As the next friend of Bandar Al Jaabir

Mohammed Zahrani

Omar Deghayes, As the next friend of Mohammed Zahrani

08-5321

Mohammed Kameen

Saki Bacha

Muhammed Saad Iqbal Madni

Houmad Warzly

Sabry Mohammed

Saleh

08-5322

Sharaf Al Sanani

Mohammed Abdullah Taha Mattan

Abdul Aziz Naji

Abdul Razak Ali

Shargowi Lnu

Sanad Ali Alkaliemi

Abdullah Bo Omer Hamza Yoyej

Abdulaziz Lnu

Jamil Ahmad Saeed

Alkhadr Abdullah Al Yafie

Tofiq Nasser Awad Al Bihani

Mohammed Ahmed Slam Al-Khateeb

Bilal Lnu

Abdul-Rahman Abdo Abulghaith Sulaiman

Abu Rawda

Abdurahman Lnu

Ahmed S. Omar

Edress Lnu

Mohammed Ahmed Saeed Hidar

Samir Lnu

08-5323

Jobran Saad Al-Quhtani

Nawal Maday Al-Quhtani, as Next Friend of Jobran Saad Al-Quhtani

08-5325

Talah Ahmed Mohammed Ali Almjrd

Ahmed Mohammed Ali Almjrd, as Next Friend of Talah Ahmed Mohammed Ali Almjrd

08-5326

Ahmed Al-delebany

08-5327

Ghanim Abdulrahman Al-Harbi

Ravil Mingazov

Zainulabidin Merozhev

Elham Battayav, as Next Friend of the above-named Petitioners

08-5328

Abdulli Feghoul

08-5329

Mohammed Abdullah Mohammed Ba Odah

Tariq Ali Abdullah Mohammed Ba Odah

Nasser Ali Abdullah Ba Odah, Next friend of Mohammaed Abdullah Mohammed Ba Odah and Tariq Ali Abdullah Ba Odah

08-5330; 08-5332

Qari Saad Iqbal

Mohammad Sharief, as Next Friend of Qari Saad Iqbal

08-5333

Majid Khan

Rabia Khan, As next Friend of Majid Khan

08-5334

Qari Hamdullah, also known as Maulavi Tarakheil Hamidullah

Mohammad Nasir, as Next Friend of Qari Hamdullah

08-5335

Faiz Ahmed Yahia Suliman

Haddad Ahmed Yahia Suliman, as the next friend of Faiz Ahmed Yahia Suliman

08-5336

Elisher

Sabir, As next friend of Elisher

08-5338

Iyob Murshad Ali Saleh, also known as Ayoub Murshid Ali Saleh

Murshad Ali Saleh

08-5339

Fadhel Hussein Saleh Hentif

Haykal Mohammed Saleh Hentif, As next friend of Fadhel Hussein Saleh Hentif

08-5340

Mohamed Al-Zarnouqi

Mashour Abdullah Muqbel Alsabri

Mohamed Muqbel Ahmed Alsabri, as next friend of Mashour Abdullah Muqbel Alsabri

08-5341

Abdulrahman Muhammad Saleh Nasser

Muhammad Muhammad Saleh Nasser, as next friend af Abdulrahman Muhammad Saleh Nasser

08-5342

Ridah Bin Saleh Al Yazidi

Sami Al Hajj, as Next Friend of Ridah Bin Saleh al Yazidi

08-5343

Abdurrahman Abdallah Ali Ma Al Shubati, also known as Abd Al Rahman Abdul Al Muhammad

Abdullah Ali Mahmoud Al Shubati, as Next Friend of Abdurrahman Abdallah Ali Mahmoud al Shubati

08-5345

Abdul Rahim Hussein M Ali Nasher

Scott Lloyd Fenstermaker, As Next Friend of Abdul Rahim Hussein Muhammed Ali Nashir

08-5346

Shaw Ali Khan

08-5347

Bashir Ghalaab

DISMISSED AS MOOT

08-5271

Abu Abdul Rauf Zalita

08-5331

Mohammed Ahmed Taher

08-5348

Mohammed Sulaymon Barre

08-5235

Dismissed with respect to appellee Atag Ali Abdul

08-5236

Dismissed with respect to appellees Jamal Mar'i and his next friend and Farouk Ali Ahmed Saif

08-5244

Dismissed with respect to Sherif El-Mashad and next friend

08-5314

Dismissed with respect to appellees Mohammad Rahim and next friend

08-5321

Dismissed with repect to appellee Riyad Nargeri

08-5322

Dismissed with respect to appellees Saif Ullah and Adel LNU

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Omar Khadr, Detainee, Camp Delta,
Appellee

v.

Barack Obama, President of the United States, et al.,
Appellants

No. 08-5233
September Term 2010

Consolidated with 08-5234, 08-5235, 08-5236, 08-5237, 08-5238, 08-5239, 08-5240, 08-5241, 08-5242, 08-5243, 08-5244, 08-5245, 08-5246, 08-5247, 08-5248, 08-5249, 08-5250, 08-5251, 08-5252, 08-5253, 08-5254, 08-5255, 08-5256, 08-5257, 08-5258, 08-5259, 08-5260, 08-5261, 08-5262, 08-5264, 08-5265, 08-5266, 08-5267, 08-5268, 08-5269, 08-5270, 08-5272, 08-5273, 08-5274, 08-5275, 08-5276, 08-5277, 08-5278, 08-5280, 08-5281, 08-5282, 08-5283, 08-5284, 08-5285, 08-5286, 08-5288, 08-5289, 08-5291, 08-5292,

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08-5339, 08-5340, 08-5341, 08-5342,
08-5343, 08-5345, 08-5346, 08-5347

Filed On: September 3, 2010

BEFORE: Ginsburg, Brown, and Griffith, Circuit Judges

O R D E R

Upon consideration of the government's motion to vacate and remand; the court's order to show cause filed April 29, 2010, the lodged joint response thereto, and the consolidated reply; the motion to exceed the page limit for the joint response; and the response in No. 08-5327, respondents' reply, and petitioner's reply thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to exceed the page limit be granted. The Clerk is directed to file the lodged joint response. It is

FURTHER ORDERED that the district court's order requiring advance notice of transfer, entered in Misc. No. 08-442, *In Re: Guantanamo Bay Detainee Litigation* (D.D.C. July 10, 2008), and in civil actions named therein, be vacated. *See Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Omar Khadr, Detainee, Camp Delta,
Appellee

v.

Barack Obama, President of the United States, et al.,
Appellants

No. 08-5233
September Term 2010

Consolidated with 08-5234, 08-5235, 08-5236, 08-5237, 08-5238, 08-5239, 08-5240, 08-5241, 08-5242, 08-5243, 08-5244, 08-5245, 08-5246, 08-5247, 08-5248, 08-5249, 08-5250, 08-5251, 08-5252, 08-5253, 08-5254, 08-5255, 08-5256, 08-5257, 08-5258, 08-5259, 08-5260, 08-5261, 08-5262, 08-5263, 08-5264, 08-5265, 08-5266, 08-5267, 08-5268, 08-5269, 08-5270, 08-5271, 08-5272, 08-5273, 08-5274, 08-5275, 08-5276, 08-5277, 08-5278, 08-5280, 08-5281, 08-5282, 08-5283, 08-5284, 08-5285, 08-5286, 08-5288, 08-5289, 08-5291, 08-5292, 08-5293, 08-5294, 08-5295, 08-5296, 08-5297, 08-5299,

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08-5342, 08-5343, 08-5345, 08-5346,
08-5347, 08-5348

Filed On: April 29, 2010

BEFORE: Henderson, Rogers, and Brown, Circuit Judges

ORDER

Upon consideration of the responses to the court's January 21, 2010 order; appellants' motion to vacate and remand; and appellees' motions to hold in abeyance, the notices of joinder thereto, the oppositions to the abeyance motions, and the replies, it is

ORDERED that Nos. 08-5271, 08-5331, and 08-5348 be dismissed as moot based on the government's representation that appellees Abu Abdul Rauf Zalita, Mohammed Ahmed Taher, and Mohammed Sulaymon Barre have been transferred from Guantanamo Bay and are no longer in the custody and control of the United States government. It is

FURTHER ORDERED that the consolidation of Nos. 08-5271, 08-5331, and 08- 5348 with Nos. 08-5233, et al., be terminated. It is

FURTHER ORDERED that No. 08-5235 be dismissed as moot with respect to appellee Atag Ali Abdoh. It is

FURTHER ORDERED that No. 08-5236 be dismissed as moot with respect to appellee Jamal Mar'i and his next friend, and appellee Farouk Ali Ahmed Saif. It is

FURTHER ORDERED that No. 08-5244 be dismissed as moot with respect to appellee Sherif El-Mashad and his next friend. It is

FURTHER ORDERED that No. 08-5314 be dismissed as moot with respect to appellee Mohammad Rahim and his next friend. It is

FURTHER ORDERED that No. 08-5321 be dismissed as moot with respect to appellee Riad Nargeri. It is

FURTHER ORDERED that No. 08-5322 be dismissed as moot with respect to appellees Saif Ullah and Adel Lnu. It is

FURTHER ORDERED that the motions to hold in abeyance be dismissed as moot in light of the Supreme Court's order denying the petition for writ of certiorari in *Kiyemba v. Obama*, No. 09-581 (U.S. Mar. 22, 2010). It is

FURTHER ORDERED, on the court's own motion, that the remaining appellees in these consolidated cases show cause, within 30 days of the date of this order, why the district court's orders requiring advance notice of transfer should not be vacated and the cases remanded. See Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009). Each appellee's response to the order to show cause may not exceed 10 pages, but appellees are strongly encouraged to file a joint response, not to exceed 10 pages. Appellants may file a reply, not to exceed 5 pages, within 14 days of service of each appellee's response. Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate in Nos. 08-5271, 08-5331, and 08-5348. The Clerk is further directed to withhold issuance of the mandate in Nos. 08-5235, 08-5236, 08-5244, 08-5314, 08-5321, and 08-5322 until resolution of the remainder of those appeals.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:
GUANTANAMO BAY
DETAINEE LITIGATION

Misc. No. 08-442 (TFH)

Civil Action Nos.
02-CV-0828, 04-CV-1136, 04-CV-1164, 04-CV-1194, 04-CV-1254, 04-CV-1937, 04-CV-2022, 04-CV-2035, 04-CV-2046, 04-CV-2215, 05-CV-0023, 05-CV-0247, 05-CV-0270, 05-CV-0280, 05-CV-0329, 05-CV-0359, 05-CV-0392, 05-CV-0492, 05-CV-0520, 05-CV-0526, 05-CV-0569, 05-CV-0634, 05-CV-0748, 05-CV-0763, 05-CV-0764, 05-CV-0833, 05-CV-0877, 05-CV-0881, 05-CV-0883, 05-CV-0889, 05-CV-0892, 05-CV-0993, 05-CV-0994, 05-CV-0995, 05-CV-0998, 05-CV-0999, 05-CV-1048, 05-CV-1124, 05-CV-1189, 05-CV-1220, 05-CV-1136, 05-CV-1244, 05-CV-1347, 05-CV-1353, 05-CV-1429, 05-CV-1457, 05-CV-1458, 05-CV-1487, 05-CV-1490, 05-CV-1497, 05-CV-1504, 05-CV-1505, 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590, 05-CV-1592, 05-CV-1601, 05-CV-1602, 05-CV-1607, 05-CV-1623, 05-CV-1638, 05-CV-1639, 05-CV-1645, 05-CV-1646, 05-CV-1649, 05-CV-1678, 05-CV-1704, 05-CV-1725, 05-CV-1971, 05-CV-1983, 05-CV-2010, 05-CV-2083, 05-CV-2088, 05-CV-2104, 05-CV-2112, 05-CV-2185, 05-CV-2186, 05-CV-2199, 05-CV-2200, 05-CV-2249, 05-CV-2349, 05-CV-2367, 05-CV-2371,

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ORDER

During the hearing held on July 8, 2008, petitioners' representative counsel requested that this Court order the government to provide petitioners' and the Court with 30 days' advance notice of any intended removal of a petitioner from detention at Guantanamo Bay, Cuba.

Recognizing that issues pertaining to notice of removal and a court's power to enjoin the government from removing a detainee are currently pending before the United States Court of Appeals for the District of Columbia Circuit, see Kiyemba, et at. v. Bush, et al., No. 05-5487 (consolidated), and Abdah, et al. v. Bush et al., No. 05-5224 (consolidated), and that some Judges of this Court have entered such orders and others have not, the Court adopts the reasoning of those Judges who entered orders requiring notice and, therefore,

ORDERS that, in cases in which the petitioner requests such notice, the government shall file notice

with the Court 30 days prior to any transfer of a petitioner from Guantanamo Bay, Cuba.[1]

July 10, 2008

[signed]
Thomas F. Hogan
United States District Judge

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[1] Nothing in this order should be construed as a determination that this Court has the power to enjoin the government from transferring petitioners from detention at Guantanamo Bay, Cuba.

Supreme Court, U.S.
FILED
MAR 7 - 2011
OFFICE OF THE CLERK

No. 10-751

In the Supreme Court of the United States

OMAR KHADR ET AL., PETITIONERS

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S. KNEEDLER
Deputy Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

ROBERT M. LOEB
SYDNEY FOSTER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a district court considering a habeas corpus petition may require the Executive to provide advance notice before releasing a detainee from military detention and sending him to a foreign country, where the Executive has submitted sworn declarations establishing that a detainee will neither be sent to any country where he is more likely than not to be tortured nor be detained at the behest of the United States.

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In the Supreme Court of the United States

No. 10-751

OMAR KHADR ET AL., PETITIONERS

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 24a-26a) is unreported. The order of the district court (Pet. App. 31a-33a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2010. The petition for a writ of certiorari was filed on December 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are aliens detained by the Department of Defense at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. In Executive Order No. 13,492, 3

C.F.R. 203 (2009 Comp.), the President directed a panel of Executive Branch officials led by the Attorney General to undertake "a prompt and thorough review" of each Guantanamo detainee in order to determine whether transfer, release, prosecution, or some other disposition of the individual was consistent with the national-security and foreign-policy interests of the United States and the interests of justice. *Id.* §§ 1(c), 2(d), 4. For individuals the panel determined could be repatriated or resettled, the President instructed the Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5. On May 15, 2009, the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer.

For any transfer, a key concern of the United States is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations. Before transferring a detainee, the Executive (typically through the Department of State) assesses issues concerning humane treatment of the detainee in the country of proposed transfer. The United States has provided sworn declarations to the courts below setting forth the process used to determine, before a detainee is transferred, that the transfer would be consistent with the government's post-transfer humane-treatment policy. Gov't C.A. Reply to Petrs.' Consol. Resp. to Apr. 29, 2010 Order to Show Cause, Exhs. 1-3 (Decl. of Clint Williamson, then–Ambassador-at-Large for War Crimes Issues, Department of State (July 7, 2008) (Williamson Decl.); Decl. of Sandra L. Hodgkinson, then–Deputy Assistant Secre-

tary of Defense for Detainee Affairs (July 9, 2008) (Hodgkinson Decl.); Decl. of Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, Department of State (Nov. 25, 2009) (Fried Decl.)). Each of those declarations explains that the United States will not repatriate or transfer any detainee to a country where the United States believes it is more likely than not that he will be tortured. Hodgkinson Decl. ¶ 6; Williamson Decl. ¶ 4; Fried Decl. ¶¶ 3-4. The declarations also explain that once detainees are transferred to third countries, they are "no longer in the custody and control of the United States." Hodgkinson Decl. ¶ 5. Any further detention after transfer would be "by the foreign government pursuant to its own laws and not on behalf of the United States." *Ibid.*

2. Petitioners challenged the lawfulness of their detention by filing petitions for writs of habeas corpus. Shortly after this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the district courts transferred the cases to a single judge for purposes of coordination and management. Order, *In re Guantanamo Bay Detainee Litig.*, No. 08-mc-442 (D.D.C. July 2, 2008).

Petitioners moved for an order barring the government from transferring them from Guantanamo Bay without thirty days' notice to the court and to petitioners. Pet. App. 32a. The coordinating judge granted the motion. *Id.* at 32a-33a. The judge's omnibus order applied to nearly all of the more than 100 Guantanamo habeas cases then pending.

3. The government appealed, and the court of appeals consolidated the appeals and held them in abeyance pending its decision in *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010) (*Kiyemba II*), which presented the same issue.

4. a. In April 2009, the court of appeals issued its decision in *Kiyemba II*, holding that, in light of the government's post-transfer humane-treatment policy, a court may not "bar[] the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country." 561 F.3d at 516. In reaching that conclusion, the court relied on *Munaf* v. *Geren*, 553 U.S. 674 (2008), in which this Court held that a district court could not enjoin the transfer to Iraqi authorities of American citizens detained in Iraq by an international coalition force that included the United States military. *Id.* at 681-684, 700. Petitioners in that case alleged that they feared torture by the Iraqi government, but the Court explained that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 700. The Court noted the government's statement that it would not transfer the petitioners if it believed that torture was more likely than not to result, and it held that judicial review of the Executive's determination respecting the likelihood of torture would be improper because "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 702.

The court of appeals in *Kiyemba II* noted that the record "documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured" and shows that "the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." 561

F.3d at 514. The court concluded that courts "may not question the Government's determination that a potential recipient country is not likely to torture a detainee." *Ibid.* A contrary result was not required by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, or implementing legislation, the court held, because "Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal." *Kiyemba II*, 561 F.3d at 514. The court of appeals also held that an order requiring 30 days' pre-transfer notice was improper. Such an order, the court explained, "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 515.

b. After unsuccessfully seeking rehearing en banc, the *Kiyemba II* petitioners filed a petition for a writ of certiorari, which this Court denied. 130 S. Ct. 1880 (2010).

5. After this Court denied certiorari in *Kiyemba II*, the court of appeals issued an order directing petitioners to show cause why the omnibus order at issue here should not be vacated in light of *Kiyemba II*. Pet. App. 30a. In an unpublished order, the court of appeals then vacated the omnibus order. *Id.* at 26a.

ARGUMENT

In *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010), the court of appeals correctly applied this Court's decision in *Munaf* v. *Geren*, 553 U.S. 674 (2008), in concluding that a court may not bar the transfer of a Guantanamo detainee to a

foreign country based on a detainee's challenge to the government's determination that he is not more likely than not to be tortured, nor may it require the government to provide notice before a detainee is transferred in order to facilitate such a challenge. The court of appeals has repeatedly reaffirmed *Kiyemba II*, and this Court has declined to review it. See *Kiyemba* v. *Obama*, 130 S. Ct. 1880 (2010); accord *Mohammed* v. *Obama*, 131 S. Ct. 32 (2010) (denial of application for stay); *Naji* v. *Obama*, 131 S. Ct. 32 (2010) (same).[1] In the unpublished order in this case, the court of appeals applied *Kiyemba II* to vacate the district court's omnibus order requiring notice before transfer. The order of the court of appeals does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. As an initial matter, many of the petitioners on whose behalf the petition was purportedly filed—petitioners in more than 100 habeas cases—have waived or forfeited the right to challenge the omnibus order at issue in this case. After this Court denied certiorari in *Kiyemba II*, the court of appeals issued an order requiring petitioners to show cause why the district court's order should not be vacated in light of *Kiyemba II*. Pet. App. 30a. In response to that order, some petitioners consented to the vacatur of the notice order in their cases, and many petitioners filed no response whatsoever. Responses contending that the notice order should

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[1] The court of appeals recently denied a petition for initial en banc hearing in a case that, yet again, sought to challenge *Kiyemba II*. *Abdah* v. *Obama*, No. 05-5224 (D.C Cir. Jan. 11, 2011). Petitioners' suggestion (Pet. 3 n.3) that this Court should hold their petition pending resolution of the en banc petition in *Abdah* has thus been overtaken by events.

be maintained were filed on behalf of petitioners in only thirty of more than 100 habeas cases. Pet. C.A. Mot. (June 1, 2010). Those petitioners who consented to the vacatur of the district court's order or who filed no response to the court of appeals' order to show cause have waived or forfeited their right to seek further review in this Court.

2. The court of appeals' unpublished order applying *Kiyemba II* to this case does not warrant further review. *Kiyemba II* was correctly decided, and this Court properly denied review of that decision.

In *Kiyemba II*, the court of appeals held that where the government has provided sworn declarations explaining that it will not transfer a detainee to any country where it is more likely than not that he will face torture, "a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country." 561 F.3d at 514. Because a court may not enjoin a transfer on those grounds, there is no basis for an order requiring advance notice before a transfer takes place. Moreover, a "requirement that the Government provide pre-transfer notice" would be improper for the additional reason that it would "interfere[] with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 515. As the court in *Kiyemba II* explained, "[l]ater review in a public forum of the [State] Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture * * * and to reach acceptable accommodations with other governments to address those important concerns." *Ibid.* (internal quotation marks omitted); see Williamson Decl.

¶ 10; Fried Decl. ¶ 10. The declarations in this case further explain that the State Department's "ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion." Williamson Decl. ¶ 9; Fried Decl. ¶ 9. The task of resettling detainees requires a "delicate diplomatic exchange" that "cannot occur effectively except in a confidential setting." Williamson Decl. ¶ 10; Fried Decl. ¶ 10.

The holding of *Kiyemba II* is fully consistent with this Court's decision in *Munaf*. As the court of appeals explained in *Kiyemba II*, the reasoning of *Munaf* "precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country" where, as here, "[t]he Government has declared its policy" not to transfer a detainee if torture would more likely than not result. 561 F.3d at 516. In *Munaf*, United States citizens detained in Iraq by coalition forces that included the United States military sought to block their transfer to the custody of the Iraqi government, claiming that they would be tortured if transferred. While recognizing that the allegations were "a matter of serious concern," the Court did not assess their strength or validity. Instead, the Court made clear that such determinations are properly addressed to the political Branches, which are "well situated" to determine "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is." 553 U.S. at 702. By contrast, the Court observed that "[t]he Judiciary is not suited to second-guess such determinations" and that judicial interference would "undermine the Government's ability to speak with one voice" in the foreign policy arena. *Ibid.*

3. Petitioners make no attempt to dispute those principles but instead "incorporate" (Pet. 6) arguments presented in a separate petition in *Mohammed* v. *Obama*, No. 10-746 (filed Nov. 5, 2010). This Court has not consolidated *Mohammed* with this case, nor did any of the courts below consolidate the two cases.

In any event, the arguments in the *Mohammed* petition lack merit. That petition suggests (*Mohammed* Pet. 12-15) various grounds on which *Munaf* might be distinguished, but none is persuasive. For example, it is true that petitioners in *Munaf* sought to avoid transfer to a sovereign government for criminal proceedings, see 553 U.S. at 689, while petitioners here potentially seek to avoid transfer even where no criminal proceedings are contemplated. But the fact that *Munaf* concerned a transfer for criminal proceedings did not inform the Court's analysis of petitioners' claims that they would be tortured if transferred to the Iraqi government. See *id.* at 700-703. Nor would there be any basis for holding that courts are "suited to second-guess * * * determinations," *id.* at 702, concerning the likelihood of torture upon transfer when no criminal prosecution is contemplated but not otherwise. In both circumstances, judicial review "would require federal courts to pass judgment" on foreign governments and would "undermine the Government's ability to speak with one voice in this area." *Ibid.*[2]

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[2] The *Mohammed* petition (*Mohammed* Pet. 15.) also seeks to distinguish *Munaf* on the ground that "unlike Mr. Mohammed's case, neither *Munaf* nor *Kiyemba II* involved a petitioner's claim that he faced likely torture at the hands of private parties." That argument appears to be specific to the petitioner in *Mohammed* and is not identified in the certiorari petition in this case as applicable to the petitioners here.

The *Mohammed* petition also suggests (*Mohammed* Pet. 16) that petitioners have a due process right to challenge a transfer to another country. That argument, too, is foreclosed by *Munaf*, which rejected a due process challenge by United States citizen detainees to their transfer. See 553 U.S. at 700 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."). It follows that the alien petitioners here have no due process right to challenge a determination by the Executive that a detainee is not more likely than not to be tortured in the proposed country of transfer. Nor can petitioners claim a right to advance notice of transfer where the notice could not provide them any relief. See *Estes* v. *Texas*, 381 U.S. 532, 542 (1965); *Kiyemba II*, 561 F.3d at 517-520 (Kavanaugh, J., concurring).

The *Mohammed* petition also asserts (*Mohammed* Pet. 17-18) that *Kiyemba II* conflicts with *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and the Suspension Clause, U.S. Const. Art. I, § 9. Those arguments are inconsistent with *Munaf*, which was decided the same day as *Boumediene*. As already explained, *Munaf* expressly recognized that there are circumstances in which habeas relief is unavailable to a petitioner who seeks an order barring a proposed transfer on the basis of an asserted fear of torture, where the government has determined that torture is not more likely than not to result. *Munaf* thus directly contradicts the argument that there is a free-standing right under the Suspension Clause to seek an order barring transfer on the ground of an alleged fear of torture.

Finally, although the *Mohammed* petition adverts (*Mohammed* Pet. 17) to the question whether habeas relief would be available to review proposed transfers to locations beyond the reach of the writ of habeas corpus for further detention on behalf of the United States, the petition in this case does not contend that any of the potential transfers at issue here are of that type, nor does it argue that the notice orders should be maintained to ensure that petitioners receive notice of any such transfers. Petitioners thus have forfeited any argument that they should be permitted to challenge transfers for further detention on behalf of the United States. In any event, the United States does not engage in such detention arrangements. See Hodgkinson Decl. ¶ 5 (explaining that if an individual is detained after transfer, that detention would be "by the foreign government pursuant to its own laws and not on behalf of the United States").

4. Petitioners contend (Pet. 6-8) that legislation implementing Article 3 of the CAT gives them a right to judicial review of their transfer. As the court of appeals explained in *Kiyemba II*, however, Article 3 of the CAT is not self-executing, and the legislation implementing it does not provide a basis for judicial review of Executive Branch CAT determinations outside of immigration proceedings. 561 F.3d at 514-515. In giving its advice and consent to ratification of the CAT, the Senate declared that "the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. 36,198 (1990). Thus, the provisions are not, by themselves, privately enforceable in United States courts. See *Medellin* v. *Texas*, 552 U.S. 491, 505 & n.2 (2008); *Mironescu* v. *Costner*, 480 F.3d 664, 666, 677 n.15 (4th Cir. 2007), cert. denied, 552 U.S. 1135 (2008).

Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note), to implement Article 3 of the CAT, but that legislation does not provide for judicial review of the government's post-transfer humane-treatment determinations in the Guantanamo context. Specifically, the FARRA provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252]." FARRA § 2242(d), 112 Stat. 2681-822. Petitioners are not subject to—and do not seek judicial review of—a final order of removal entered under the removal provisions of the Immigration and Nationality Act, which apply to aliens who are physically present in the United States. See *Sale* v. *Haitian Ctrs. Council*, 509 U.S. 155, 173 (1993). Nor is there any affirmative indication in the FARRA that Congress otherwise intended to create any private right to enforce Article 3 of the CAT, which is non-self-executing, in proceedings such as these brought by aliens outside the United States. See *id.* at 188 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

Congress reaffirmed the limitation in Section 2442(d) of the FARRA in 2005, when it enacted a statute providing that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, * * * a petition for review * * * shall be the sole and exclusive means for judicial review of any cause or claim" arising

under the Convention, with one exception not relevant here. 8 U.S.C. 1252(a)(4).[3]

Accordingly, Article 3 of the CAT by itself creates no privately enforceable rights, and the FARRA and 8 U.S.C. 1252(a)(4) do not provide for private enforcement of the Convention here, where petitioners attempt to assert rights under Article 3 extraterritorially and in a

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[3] Petitioners argue (Pet. 7-8) that the limitation in section 1252(a)(4) applies only in cases in which CAT claims may be asserted as part of a petition for review of an order of removal, contending that such a result follows from the title of 8 U.S.C. 1252—"Judicial Review of Orders of Removal." But, as already explained, Section 1252(a)(4) merely confirmed the limitation on jurisdiction already established in the FARRA, which is written in broad terms and does not bear a similar title. In any event, "[w]here," as here, "the statutory text is clear, the title of a statute * * * cannot limit the plain meaning of the text." *Demore* v. *Kim*, 538 U.S. 510, 535 (2003) (internal quotation marks omitted) (second alteration in original).

Petitioners' reading of Section 1252(a)(4) also fails because it would make that subsection entirely redundant with the subsection that follows it, 8 U.S.C. 1252(a)(5). See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). Section 1252(a)(5)—which was enacted at the same time as Section 1252(a)(4), see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(B), 119 Stat. 310-311—provides that "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, * * * a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." If, as petitioners believe, Section 1252(a)(4) bars habeas review of CAT claims only when those claims could be asserted in a petition for review of a final order of removal, then Section 1252(a)(4) is entirely unnecessary because Section 1252(a)(5) already bars habeas review of *all* claims that could be asserted in a petition for review. Petitioners' legislative history argument (Pet. 8) fails for the related reason that it pertains not to 8 U.S.C. 1252(a)(4) but to Section 1252(a)(5) and other related provisions enacted at the same time as Section 1252(a)(4).

non-immigration context. See *Munaf*, 553 U.S. at 703 n.6 (observing that FARRA "may be limited to certain immigration proceedings"); *Khouzam* v. *Attorney Gen.*, 549 F.3d 235, 245 (3d Cir. 2008) (holding that Section 1252(a)(4) precludes the assertion of jurisdiction over a habeas petition raising CAT claims); *Mironescu*, 480 F.3d at 674 (holding that "although courts may consider or review CAT or FARR[A] claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims"); but see *Trinidad y Garcia* v. *Benov*, 395 Fed. Appx. 329, 331-332 (9th Cir. 2010) (holding that prior circuit precedent dictated a holding that CAT claims are judicially reviewable in the extradition context but noting that "[i]f we were writing on a clean a slate, we would hold that the Government has the better of the argument"), petition for reh'g en banc granted (Feb. 28, 2011).[4]

Petitioners contend (Pet. 8-9), in the alternative, that 8 U.S.C. 1252(a)(4) amounts to an unconstitutional suspension of the writ of habeas corpus if it does not permit them to assert CAT Article 3 claims here. But the FARRA and Section 1252(a)(4) did not "suspend" a pre-existing authority to adjudicate such claims in habeas corpus actions. Because Article 3 of the CAT is not self-executing, the question is whether the statutes conferred on courts the authority to adjudicate CAT Article

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[4] The Ninth Circuit's decision in *Trinidad y Garcia* arose in the distinct context of extradition from the United States, and for that reason alone would not suggest that review would be warranted in this case involving aliens detained at Guantanamo Bay. In any event, on February 28, 2011, the Ninth Circuit granted rehearing en banc in *Trinidad y Garcia*, thereby demonstrating that the Ninth Circuit will reconsider the issue there and rendering review by this Court all the more unwarranted.

3 claims beyond the immigration context in habeas corpus actions, and *Kiyemba II* properly held that they did not.

Moreover, the FARRA and Section 1252(a)(4) do not bar habeas jurisdiction altogether; they bar habeas jurisdiction only over claims arising under the CAT, which itself creates no judicially enforceable rights. The Suspension Clause does not require Congress to provide detainees with the right to enforce non-self-executing provisions of treaties in habeas. See *Noriega* v. *Pastrana*, 564 F.3d 1290, 1294 (11th Cir. 2009) (holding that Section 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, which prohibits petitioners from invoking the Geneva Conventions as a source of rights, does not violate the Suspension Clause because it "at most changes one substantive provision of law upon which a party might rely in seeking habeas relief"), cert. denied, 130 S. Ct. 1002 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER*
Deputy Solicitor General

TONY WEST
Assistant Attorney General

ROBERT M. LOEB
SYDNEY FOSTER
Attorneys

MARCH 2011

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* The Acting Solicitor General is recused in this case.

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No. 10-751

IN THE

Supreme Court of the United States

OMAR KHADR, *et al*
(AND CONSOLIDATED CASES),
Petitioners,

v.

BARACK OBAMA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

SHAYANA D. KADIDAL
J. WELLS DIXON
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
skadidal@ccrjustice.org
wdixon@ccrjustice.org

DAVID H. REMES
Counsel of Record
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508
remesdh@gmail.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

1. This is one of three interlinked cases in which Guantánamo detainees seek to overturn the D.C. Circuit's decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*").

(a) *Mohammed v. Obama*, No. 10-746. The petitioner, an Algerian, sought reinstatement of a preliminary injunction barring the Government from transferring him to Algeria. The D.C. Circuit overturned the injunction based on *Kiyemba II*. On January 5, 2011, the Government transferred Mr. Mohammed to Algeria, rendering his case moot. In his reply brief, Mr. Mohammed acknowledged that his case was moot and stated that he will move to dismiss it under Rule 46. He suggested, however, that the Court consult his petition in considering Mr. Khadr's petition, because Mr. Khadr's petition and Mr. Mohammed's petition present a common question, and to avoid duplication, Mr. Khadr incorporated in his petition Mr. Mohammed's discussion of the common question. (*See* Khadr Pet. at 6.)

(b) *Khadr v. Obama*, No. 10-751. In this case – the instant case – Petitioners seek reinstatement of orders issued in 2008 ("2008 notice orders") requiring the Government to give a detainee's counsel 30-days' notice of any intended transfer of the detainee from Guantánamo. The D.C. Circuit overturned the 2008 notice orders based on *Kiyemba II*.

(c) *Abdah v. Obama*, D.C. Cir. No 05-5224. In *Abdah*, the Government seeks invalidation of orders issued in 2005 ("2005 notice orders") requiring it to give a detainee's counsel 30-days' notice of any intended transfer of the detainee from Guantánamo. The Government argues that the 2005 notice orders are precluded by *Kiyemba II*. The D.C. Circuit denied

the petitioners' request for initial hearing en banc. *Abdah v. Obama*, 630 F.3d 1047 (D.C. Cir. 2011). Circuit Judge Thomas B. Griffith, joined by Judge Judith W. Rogers and Judge David S. Tatel, dissented. *Id.* at 1048-54. The D.C. Circuit has not yet acted on the Government's appeal.

2 In his dissent from the D.C. Circuit's denial of initial hearing en banc in *Abdah*, Judge Griffith called *Kiyemba II* "fundamentally flawed." *Abdah*, 630 F.3d at 1048. Judge Griffith first reviewed the historical record. *Id.* at 1048-51. He concluded: "Since at least the seventeenth century, the writ of habeas corpus has guaranteed prisoners the very right the *Kiyemba II* court failed to protect: the right to challenge transfers beyond the reach of the writ." *Id.* at 1048. Judge Griffith then reviewed the *Kiyemba II* court's reading and application of *Munaf v. Geren*, 553 U.S. 674 (2008). *Abdah*, 630 F.3d at 1052-54. Judge Griffith pointed out that "[w]hether the *Munaf* prisoners were entitled to notice was never at issue, because the prisoners already had notice of their proposed transfers and a meaningful opportunity to challenge them in an Article III court. By denying these fundamental procedural rights, *Kiyemba II* went well beyond the holding of *Munaf*." *Id.* at 1052. Judge Griffith stated:

> In relying on *Munaf*'s treatment of the merits of a transfer claim, the *Kiyemba II* court was fundamentally confused. Notice is a necessary element of the right to challenge a transfer, and this right does not depend on whether the challenge is likely to succeed. By holding otherwise, the *Kiyemba II* court put the detainee in an impossible position: To receive

> notice of a transfer, he must first show that it is likely unlawful. But he cannot make that showing without knowing any details of his transfer except that he might be sent some day to some place for some reason. This Catch-22 eliminates any "meaningful opportunity" to challenge a transfer.

Id. at 1053-54 (citing *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

In its discussion of *Munaf*, the Government, like the *Kiyemba II* court, "fundamentally confused" the right of a detainee to challenge a transfer (and thus the right to be given notice of the transfer) and the likelihood that the detainee's challenge will succeed. (*See* Br. Opp'n at 5-6, 8.) The Government's only answer is that "petitioners [cannot] claim a right to advance notice of transfer where the notice could not provide any relief" (*Id.* at 10; *see also id.* at 7.) But as Judge Griffith noted, the D.C. Circuit itself "allowed for the possibility that some transfers could be unlawful." *Abdah*, 630 F.3d at 1054. *Munaf* also allowed for that possibility, in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 553 U.S. at 702; *see id.* at 706 (Souter, J., joined by Ginsburg and Breyer, JJ., concurring).

The Government argues that Petitioners' claim that they have a due process right to challenge a transfer to another country "is foreclosed by *Munaf*, which rejected a due process challenge by United States citizen detainees to their transfer." (Br. Opp'n at 10) The context and nature of the *Munaf* petitioners' claims were entirely different from those of Peti-

tioners here. *See Munaf*, 553 U.S. at 695. This Court stressed, moreover, that the cases "concern[ed] only the statutory reach of the writ" and did not address "the constitutional scope of the writ." *Munaf*, 553 U.S. at 685 n.2. *Boumediene* held that Guantánamo detainees have a constitutional right to seek the writ. *See* 553 U.S. at 771. Finally, *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008), on which the Government relies (Br. Opp'n at 12), held that the petitioner, an Egyptian facing return to Egypt, "was denied Due Process" because the Government failed to provide him with notice and an opportunity to test the reliability of Egypt's diplomatic assurances that he would not be tortured if returned. 549 F.3d at 260.

3. Finally, the Government is silent as to Mr. Khadr's claim that section 242(a)(4) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(a)(4), would violate the Equal Protection Clause if construed to allow only individuals seeking judicial review of removal orders to assert CAT claims, while precluding other individuals, who may also be facing transfers to likely torture, from asserting such claims. (*See* Pet. 9.)[1]

The Court should grant the petition.

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[1] As noted, this Court declined to reach the § 242(a)(4) issue in *Munaf* (Pet. 5.) *See Munaf*, 553 U.S. at 703 n.6.

Respectfully submitted,

David H. Remes
Counsel of Record
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508
remesdh@gmail.com

Shayana D. Kadidal
J. Wells Dixon
CENTER FOR
CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
skadidal@ccrjustice.org
wdixon@ccrjustice.org

Counsel for Petitioners